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ABSTRACT

In 1978 a complaint was filed by New Hampshire Legal Assistance against Laconia Developmental Services, New Hampshire's only public institution for children and adults with developmental disabilities. The decision from the Federal district court judge in August 1981 ordered the state to devise a plan for: institutional improvement; development of community service options within available resources; and special education responsive to children with severe disabilities. An implementation plan was developed by the state, calling for significant community placements and the building up of important community infrastructure. Factors that contributed to the positive outcomes of the litigation included poor institutional conditions, few community services, timing, the development of a model for nondiscrimination against people with severe disabilities in the Pennhurst case in Pennsylvania, the public nature of the trial, the influence of outside experts, the maintenance of the state's role in planning services rather than assignment of a court monitor, courage and tenacity of the parents, the wisdom of the judge, and minimal organized opposition. Highlights in the litigation process, effect on state administration and planning, and the decision to not apply for special education certification are also discussed. (Contains 19 references.) (JDD)

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GARRITY V.GALLEN: THE ROLE OF THE COURT IN INSTITUTIONAL CLOSURE

COMMUNITY AND POLICY STUDIES

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GARRITY V.GALLEN:
THE ROLE OF THE COURT IN INSTITUTIONAL CLOSURE

Julie Ann Racino

COMMUNITY AND POLICY STUDIES
Syracuse, New York

1993

This is one in a series of qualitative case studies on state and national practices in deinstitutionalization and community integration and the changes that will be necessary to promote the full participation of people with disabilities in all aspects of community life and daily policymaking. The research for this study was conducted in Fall 1991 through Summer 1992 in the state of New Hampshire. The author particularly extends thanks to Don Shumway, John MacIntosh, Richard Cohen, Freeda Smith, Ray Blodgett, Richard Lepore, Alan Robichaud, Jane Hunt, Chris Nicolletta and Lou Brown for their assistance with this case study.

When he was about ten and a half or eleven, we made the decision for the Laconia State School...So with our backs against the wall, we took him up there. That was one day that neither of us ever recovered from; it was without question the worst day of our lives...It was just a horrible experience and it took quite awhile to get over it so we could even talk about it.

He took a lot of abuse up there as did some of the others who would not defend themselves. Sam was kicked in the testicles so much that he was herniated from it and that had to be repaired surgically after a few years. And they would find him unconscious.

We were always searching for something better for him. But if we thought we found a place, either it wasn't what we expected or we couldn't afford it because this kind of care can become pretty expensive if you are footing the bill...And we just didn't have those resources so we had to stay with the state of New Hampshire and the Laconia State School.

We came to feel a certain sense of security there feeling it was a state operated institution. So as long as the state was functioning, why there'd be a place for our children; plus there was nothing else anyway...Many parents, including ourselves, then resisted their children leaving the state facility because of the stability and security even though there were many things that weren't right and were unpleasant.

Everyone has been out of Laconia now for a year...(The region) promised us great things, but we have been promised great things many times, but nothing ever happened, so we took it all with a grain of salt....They have done everything they said they would do. And if we can find anything to ask for, which isn't much, they are right on it.

It just worked out; it's (as if) just something we could even never dream of just happened. A few years ago we couldn't have even imagined Sam in this situation, but thank goodness it happened...He is living like you and I live or anybody else, in a home. And he has recreation and activities and cleanliness and he is not being beat up on and kicked everyday. It is a normal form of the way a person should live. And he is able to experience that now, when for a long time he couldn't...so he has had to learn a whole new lifestyle... It takes a long time to relax and not be on guard for 24 hours a day.

- Sam's father and institutional parent group leader, 1991

Brief History

In 1977, the Pennhurst case was considered to be the first "frontal assault on an institution seeking community relief" in the United States. Based on findings of federal and Constitutional violations, Judge Broderick issued an order in March 1978 requiring community placements and services for the class of about 1200 people at the Pennhurst institution in Pennsylvania.

Meanwhile, New Hampshire Legal Assistance was approached by the New Hamsphire State Association for Retarded Citizens (ARC) to "file a lawsuit" regarding Laconia, the state's only public institution for people with developmental disabilities because of the horrendous conditions and the growing feeling that there was a "dumping of people in inappropriate placements." New Hampshire Legal Assistance was reluctant to take on the case having just completed extensive prison litigation.

In September 1977, New Hampshire Legal Assistance held its first major retreat, inviting their clients, staff, the director, and others representing their cross-disability constituencies to determine what the priorities would be for their legal assistance. Both the Executive Director of the ARC and the state ARC president were the two key "outsiders" there. Largely through their advocacy efforts, the decision that Laconia should be the priority was agreed to unanimously, including by AFDC (Aid for Dependent Children) clients, because the conditions were so very bad.

Several attorneys, including one with background in mental health and prison litigation, were given the assignment and

researched the possibility of a lawsuit. He had already visited Laconia and said "he could not begin to tell you the pain that I felt and the disgust."

Several parents agreed that their children, who represented the range of disabilities and the ARC, could be the named plaintiffs. One of the parent leaders, whose daughter lived at Laconia, needed to "take a lot of heat alone" and she "never let up" and "she was tough."

In April 1978, the Laconia complaint was filed, making it the first federal lawsuit after Pennhurst. That was significant in relationship to Pennhurst because the lawyers were able to use "the claims very specifically modeled after Pennhurst." There was interaction between Pennhurst and Laconia in a number of important ways, including overlap in witnesses and experts, the role of the Justice Department, and specific references to court orders and opinions between the cases.

The period of litigation between 1978 and 1981 was very antagonistic with the whole discovery process being "very hard ball" with "depositions and interrogations and expert witnesses by the busload, truckloads of paper." The public trial lasted from April 1980 through June 1980, making it "the longest civil trial in New Hampshire history."

During the trial, articles appeared almost daily in the state newspaper and the case was "so much talked about that everyone felt tangentially involved." Institutional conditions were exposed and people's attitudes in the community, as reflected in the newspaper

editorials, changed saying what had occurred in the institution was wrong.

The decision from the federal district court judge came in August 1981. While he did not order community placements, he found that people had a "right to habilitation." He also found that discrimination had occurred against people with the most severe handicaps. The findings on special education and on the ability of the people with significant disabilities to learn and benefit from the right kind of setting were also significant.

The state was ordered to come up with an implementation plan by November 1981. The implementation plan was the window of opportunity taken by state planners who came up with four plans: A,B,C, and D with plan C masterfully designed as the "right choice." Plan C called for significant community placements and the building up of all the important community infrastructure. Some of the people who wrote or contributed to the plan continued with implementation through the time of the institutional closure in 1991.

The judge's decision was "Solomon-like" with everyone winning. The state was ordered to plan, which is its role, and was given federal court support to develop the community services system. The plaintiffs won their suit and the state was to implement or deliver on what the plaintiffs had asked for. In many views, the judge came up with "just the right thing."

From the administration viewpoint, the court order had three foci: institutional improvement, developing community service

options within available resources, and making special education responsive to youngsters with severe disabilities. By 1985, the community placements of approximately 225 were done and the basic institutional improvements were made.

After 1981, the antagonism that marked the earlier period changed to healthy relationships, some of which had previously been behind the scenes in "strange kinds of cooperation" by people on opposite sides of the fence, but with a common goal.

After the decision, the state reported monthly to the court in a type of working document to accomplish the order. This method versus the use of a court monitor was viewed as key by state officials to keeping the flexibility required to adjust to changing practices within the disability field.

By the mid-1980s placements had slowed down as community agencies became more involved in local issues and legal handles for further movement had eroded. In 1986, the institutional superintendent changed, and a sustained effort from within the institution contributed in part to its closure in January 1991. The state has never been released from the court order, which is still open, though was not active in 1992.

The litigation is almost universally recognized within the New Hampshire disability field as an absolutely necessary condition for the institutional closure and the development of the community services system. Unlike most litigation, there were also very few negative impacts of the legal actions with tremendous benefits ranging from public education to financial support.

However, the litigation, led by parents, was not sufficient in itself for the institutional closure to have occurred. The leadership of state planners, interacting with the litigation, was key over the entire period. While there were numerous contributions throughout the state to the joint effort of closure, the actions in the late 80s and early 90s of those within the institution also appear pivotal in the final steps that led to the closure.

KEY FACTORS

This section of the case study describes a number of the significant factors surrounding this litigation that contributed to its positive outcomes. These are described so that others can compare these features to their own involvements within their states with institutional reductions and closures.

Poor Institutional Conditions

One of the key factors was that the institutional conditions were "horrendous." Like other institutions in the country, Laconia had become very overcrowded, at the same time staff cutbacks were being made by the Governor. The conditions were so dismal that even the defendants' experts and the institutional superintendent expressed concern about conditions there.

At Laconia, about half the buildings were certified as intermediate care facilities (ICF-MR) and half were not, although the certified ones were described as "only a bit better." The three best facilities were "cottages" that housed a total of 90 people.

The Powell building, which housed "presumably the most severely involved" was remembered as the worst. In the Powell building, there were four wards. Each had a sleeping area of 40 by 50 feet, maybe 30 beds lined next to each other, a day room of 15 by 25 feet with benches around the perimeter, and mass bathrooms where people were hosed down. As another lawyer described:

> People (were) enclosed, sticking their heads into toilets, the smell of feces and food and vomit mixed together in an environment that was not ventilated sufficiently and staff overwhelmed and demoralized by the experience...The eating situations... were a circus type of affair. People being fed; folks who had more skills stealing from those who were less skillful. People who were at the institution presumably for residential purposes assisting people with more severe disabilities because the staff weren't available in sufficient numbers to do that. It was a deplorable thing.

The building closed in June 78, two months after the suit was filed, but the people were moved into other older buildings which then became "equally inhumane because it created an even more overcrowded situation."

According to one of the lawyers, the New Hampshire institution was not as medically based as those in other states. Between 1975 and 1978, reportedly the institutional superintendent had done a good job of reducing the use of seclusion and restraints so there were not as many shock treatments, papoose boards or ten point restraints visible. Over 40% of the residents at the time of filing, however, were on some form of psychotropic medications.

A Clean Slate: No Community Services

One way to view the New Hampshire community services system at the time of filing the complaint is like a "clean slate" with

"very little, good or bad, that was occurring in the community." Their neighboring states of Maine and Vermont would have been considered considerably ahead in terms of community development.

Community services were still young nationwide with most evidence anecdotal, except for a couple of studies by English psychiatrists. ENCOR, a regional system in Nebraska, and Macomb-Oakland, a region in Michigan, were all doing part, but not complete systems of community services.

At the time of the filing of the complaint, there were no community services in New Hampshire except for several group homes for people with mild handicaps and scattered sheltered workshops or day habilitation sites. There also was no regional structure, basically Laconia or nothing.

The community services budget "hovered around the $250,000 figure." While there were "supposed to be fixed points of referral, there was nothing to refer people to." Although the developmental disabilities legislation, RSA171A, was "on the books for 2 to 3 years, it had not been funded."

The Litigation Context: Timing is Everything

As another person knowledgeable in institutional litigation stated, "the timing was just right. Timing is everything." The Pennhurst orders had been very favorable toward community placements, but they were being overturned by the Supreme Court. Though a settlement occurred with the state of Pennsylvania to close the facility, from a legal viewpoint, "things didn't look as rosy."

Laconia slipped through during the proverbial "window of opportunity" just as the litigation victories were beginning to turn. It was credible at the time that there were legal rights to community services and that the state had an obligation to provide them. According to another lawyer, because the legal context was uncertain, the state of New Hampshire was hesitant to take a "strident stand." Yet others said, "Unlike a half dozen other suits filed around the country at that time, Laconia was one of the few that carried through the trial, to an order, and through implementation."

Significant Legal Features: Nondiscrimination Against People with Severe Handicaps

The New Hampshire case was modeled on Pennhurst, which has as its most significant feature the direct claim of the right to community services derived from the Constitution, Section 504 of the Rehabilitation Act and State Law. The essential constitutional theory was that based on the 14th amendment, as a matter of due process, one should not be confined to an institution or restrictive setting if there were less restrictive alternatives available.

From the point of view of counsel for the plaintiffs, the basic case was aimed at three points: indicating what a terrible place Laconia was, showing the potential of a person with mental retardation, and demonstrating that no matter what the person's potential, they could live in a community setting. As one of the plaintiffs' lawyers described the state of the art:

> There were good examples that (Marc) Gold would refer to in terms of persons with the most extraordinary disabilities, assembling parts at NASA. And (there were) inclusive education programs, though we didn't call them that at the time, in Madison and other places, but none of it in any kind of coherent singular location.

The defense was threefold: it doesn't make any sense to court order x, y, or z, when there is so much disagreement in the field. Second, all these community programs are not really what they are cracked up to be. Third, the state had made improvements in the institution (though they didn't defend the institution itself) and were planning to move in that direction anyway (the plan called Action for Independence). The plaintiff's lawyer agreed that the state had some potentially good arguments:

> The state could effectively say that what the plaintiffs have pointed to are isolated examples of where people with extraordinary commitment and values have made it succeed, but that is neither the pattern (n)or what represents the mainstream of professional judgment.

The ultimate battleground was fought around people with medical and behavioral needs. As one attorney explained, "The state knew it had an indefensible case, though they perceived our view to be arrogant. They said they would develop community services for some, but not all of the people...The irony is that the people who are the easiest to move and the safest to move are the people with medical needs. If you've survived an institution, you are probably pretty hardy."

A major strategy used by counsel for the plaintiffs was to "have the state identify people whom they thought needed an

institution and we found a developmental twin in the community." Even though there were few people living in the community, "we found surprising, but isolated pockets of wonderful school efforts in New Hampshire where there were both cultural and geographical reasons why they did not want kids sent down to the institution. Keene also had developed some different alternatives for individuals."

In Garrity v. Gallen, "the judge basically used the 504 non-discrimination in the institutional context." In a very important finding, the federal district court judge concluded that it was not alright to discriminate between those with or without severe handicaps. So he basically said that the state could not provide a "different quality of services" or a different set of services based upon severity." The state was required to address the problems of those who were the "most severely handicapped." If they did not address them in the community context, then they needed to do so in the institutional context, "which probably proved impossible." New Hampshire was important in a legal sense in terms of convincing the court that community bases of placement actually were beneficial.

The Class of Plaintiffs

The six complainants represented a "spectrum of disabilities" at Laconia as well as with the state ARC. Parents needed to be committed to the notion that their child might be living in the community someday. As one observer expalined, "Compared to some other states, the plaintiffs were a group of families who were

really very unhappy with Laconia...who were really pushing for community alternatives, (though) they were certainly pushing for a better Laconia at first, too, (be)cause it was (a) pretty awful place."

The class itself was "fairly loosely circumscribed in the court order." The vagueness was of benefit to those who support community living because the class could be interpreted to be defined as "all those who had been institutionalized and all those who would be in danger of being institutionalized." Operationally, the class was defined not only as the 620-640 people living at Laconia, but also those who were at risk of going in or who were on "unconditional discharge status" for a total combined class of about 750.

Public Nature of Trial: The Role of the Media

The fact that a visible, public trial took place instead of a consent decree had an enormous impact for the future development of community services in the state and was "a milestone process". As one lawyer expressed: "There's nothing like a trial to educate the judge and the public about what is going on." A state official concurred:

> The trial itself was a milestone process. I'm really glad that we didn't have a consent decree and went to trial. The trial was necessary to inform the public....It then had to go outside state government and attorneys and so forth, and the newspapers had to learn what was being argued, understand what the plaintiffs were asking for.

There were articles virtually daily in the newspaper during the lengthy trial in part because of the potential cost to

taxpayers. Before the trial, the press concentrated on the institutional conditions and on the settlement part, presenting the plaintiffs as "unneccessary radicals." While the plaintiffs' lawyers admit to a degree of naiveity in those days about the media, the trial changed all that:

> At the time, this attracted enormous media attention. If the plaintiffs win, it will cost $150 million in income tax. We were beaten up for two and a half years by the conservative press for being undemocratic and by the liberal press for the strident position on closure. Twelve weeks of trials changed people's attitudes; you could see it in the editorials. The Union Leader said "we (the community) have done wrong. We need to do the right thing." The stories were so horrible.

In particular, an intuitive cub reporter from the Union Leader, the only statewide newspaper in New Hampshire, was in court almost everyday, and ultimately influenced the reporting that occurred. He was a "high quality professional" who "had incredible talent and did some superlative reporting." As a state official expressed:

> We lucked out, had some very great reporters...(They) did some reporting that was superlative and challenged the editorial views of their own editors. (This then)...became a masterpiece of unveiling of what the story was, what the issues were, and what could be. And then set the stage for an editorial position for the newspapers and media that became very supportive of change.

Outside Experts

Because New Hampshire was a small state, the outside experts were able to "really deluge(d) the state, in a concentrated way with all these experts and with this whole aura, of here are the possibilities". As one expert noted, "we were young enough to just constantly say that the state of the art was the only way to go."

Aided by the visibility of the public trial and the relatively "clean slate" in the community, an important philosophical and practical base was at stake for the future development of the service system.

In some ways, in New Hampshire, the trial tried out in a very clear way for a very long time, two distinctly different philosophies of how to view people with disabilities. As one professional described it,

> those were probably best represented by TASH (the Association of Persons with Severe Handicaps)...and others....who were of another era...who felt that without any experience to back this up, that there were those who were so neurologically involved, so complex...so behaviorally damaged that they could never leave the institution or would die.

This was one of the first times that one of the TASH founders and a noted figure in the field of special education, testified in an institution case. Recalling one of his first conversations with this leader, a lawyer for the plaintiffs recounted:

> he said I won't help if you want to fix up the institution. If you want to close it, I'll put you in touch with every expert you'll need.

The lawyers took this witness to a place in the middle of New Hampshire to a high school with juniors and seniors, "pretty severely handicapped kids", who were working in the local drug store, grocery and hardware store with job coaching and relying on the owner to help out. "He would (then be able to) tell the judge, right here in New Hampshire you are doing it your honor."

This TASH leader also recalls his visits around the state,

saying that the strategy was not to characterize people as bad, but to try and find some good examples, even though they were very few in number:

> We wanted to have positive community displays to the judge. So we went around looking in New Hampshire for some good things and we found a couple...It was such a small state and they put their money into institutionalization, essentially, denying services to people...(Due to the minimal community development) it was easy to build the right stuff to start from state-of-the-art and to guide it.

More though, was at stake than the specific trial. The Associaton of Persons with Severe Handicaps (TASH), which first developed as a concept around 1971-72, had "an enemy to fight." As one of its leaders who was strongly committed to community life for people with the most severe handicaps saw the challenge "We had the best young talent in the field and they didn't, they didn't...they thought they were hot stuff and we just beat them badly. To me, that's very, very important."

The experts for the plaintiffs testified that everyone can live in the community. The defense experts, in contrast, ranged from very conservative (one even suggested increasing the size of the institution), or committed to keeping a residual institutional capacity, though a few said people could move to the community once the infrastructure was put in place.

No Court Monitor or Master: Maintaining the State Roles

State officials strongly believe that the fact that a court order was in place instead of a court monitor was a key factor contributing to long term success. In Laconia, the state developed

a plan and a planning process which resulted in an order of compliance. The court order allowed for flexibility to continue to innovate and change so that the system did not become stagnant. According to one state administrator:

> We worked real hard to not have a court monitor, to have a process by which we reported to the court and by which we kept the capacity to keep changing some of the implementation of the order on the basis of new things changing or happening...I really believe that the fact that we didn't have a court monitor allowed us to keep trying innovative programs, trying new things, changing direction.

Part of the reason this was viewed as critical was it kept the state responsible for doing its job in planning and developing, while still being held accountable.

On a personal level, it would have been considered insulting and offensive to have a court monitor. While the plaintiff's lawyers had asked for that, upon reflection one shared it was "probably helpful not to have another level of state bureaucracy" and the struggles between the judicial and executive branch, such as occurred in Connecticut. On the other hand, it did not prove necessary in New Hampshire because there was not a recalcitrance on the part of the state or strong vested interest groups.

Because the federal court ordered the state to plan, this could be viewed as a "kind of mediation" which toned down the legalistic aspects and moved the policies and implementation out front with strong financial and judicial support. As described by one state official:

> They gave us license to come forward with the right thing, or at least what we thought was the right thing, and then the court ordered it, put the weight of the federal court behind what the executive branch said it wanted to do, (and to) which the plaintiffs could agree...That has been of enormous importance.

Commitment and Leadership

This effort was successful in large part because of the courage and tenacity of the parents who filed the suit, the commitment of the lawyers to the causes they were advocating for, the leadership of state planners and area agencies in implementation, and the wisdom of the judge.

Plaintiffs' Lawyers. The lawyers worked hard, fought aggressively and steadfastly, became educated and spent time educating others, and were available to the families. They provided guidance and advice, used the opportunity to "reshape the service system" and collaborated effectively with the Justice Department.

The Justice Department. From the point of view of the plaintiffs, "the Justice Department was enormously helpful. They had a lot of experiences and resources. They had a lot of money. If you needed experts, they could pay." Their involvement was a significant factor in making the lengthy trial possible.

The State Planners. They played a critical role in the pretrial, trial and after trial phases. They wrote the plan Action for Independence, which became the plan that was eventually implemented in the state. This gave the state Division an authority and license that was important in managing and guiding the creation of the community service system. The state leadership had to keep

everything together, talk with both sets of attorneys, and maintain good relationships with all parties.("That's the role that we have to play in keeping it firmly grounded and doing the right thing for individuals which you can't argue with that.")

Area Agencies. The area agencies played several different roles that contributed to the successful outcomes, including providing information, acting as experts, demonstrating that good community services could be done, and developing their own political support ("Whenever we needed information for the lawsuit, we got it from the area agencies. The state had "no control" over them as private, non-profits.")

In the early days of the lawsuit, three or four regions were considered to be particularly committed to serving all people in the community. One of the results of the lawsuit was that the providers gained confidence in serving people with severe handicaps. "They even made a substantial dent in that population, in mid, the numbers varied, I think anywhere to 50 to 150 in New Hampshire hospital who were developmentally disabled and mentally ill or maybe even not mentally ill." During implementation, the placements were generally successful. "They were good and the parents were happy."

The Wisdom of the Judge. The federal district court judge, who was recently appointed to the bench, was critical. The plaintiffs' attorneys spent a lot of time in educating the judge since he was new to these kinds of cases and it would require many years to implement. ("He had to get angry about abuses and the

devastation to families, why the community was necessary for people to grow and not be harmed.") The judge was described by one of the attorneys as:

> a moderate to conservative Democrat. He knew this was a case that he wasn't going to get rid of for a long time. He also knew it was going to be scrutinized for a long time, morally, politically, and legally. He also didn't trust the state... In my view, (he) felt that community was the way to go. But, (he was) judicially suspect of whether the constitutional law mandated that. Not surprisingly, he cajoled and threatened the other parties involved to settle the case, but we couldn't.

A great deal of respect is paid to the federal district judge in the litigation for the way he "managed the case" and for the wisdom he showed in his win-win decisions. He allowed the ten week trial because he knew it was important ("He gave us that opportunity."). As another attorney described:

> If there was a possibility of settlement he allowed that to kind of flower, but ...he didn't try to delay things and put pressure on. And that was really helpful, because it kept the case, kept momentum going.

In many ways, the judge came up with an ideal solution, sorting through the longest civil trial in New Hampshire's history. As one state official surmised:

> The judge cut the baby in half perfectly. It was a Solomon like decision. The judge ordered us to plan. So that the plaintiffs won; but we won...So the state gets to implement the way it wants to implement provided that it delivers on what the plaintiff outcome is...the state couldn't say it wouldn't go forward because it was being ordered to do what it wanted to do, and...the plaintiffs couldn't say they didn't want the state to go forward because the judge told them they won...so it was a very cohesive concept of a court order.

Cooperation

Probably the most important aspect of change was that there were people located both within and outside of the system who had a common goal. This resulted in lots of "strange kinds of cooperation" between people who were "alleged adversaries" whereby benefits accrued to all. This cooperation was not eroded by the adverserial process, and adverseries continue to speak highly of each other's roles today.

In their "heart of hearts" state disability officials believed that people with severe disabilities could live in the community, though politically the Attorney General was safeguarding the legal position of the state. One state administrator simply explained this distinction:

> Fairly generally, I think our position was, from the state perspectives, we were fighting the lawsuit through the attorney general's office. From the division's perspective, we were still trying to come out with a decision that was consistent with the technology of the day so that we could carry that out and figure out how to do that.

The focus on the part of a number of key people, both inside and outside the system, was on finding a way to move forward so that change could occur to better the lives of people with disabilities.

> It is really a situation where people have to say we've got to change and we've got to work together and we've got to give each other information that will help this go forward because we all recognize the need for change.

Once the litigation phase was passed, there was an opportunity to rebuild healthy relationships which was relatively easy in a situation where people are "reasonable" and "want to do the right

thing." The foundation was a shared belief among both the state planners and the plaintiffs that people with disabilities can live in the community. In essence, "that's the difference" between this situation and many other instances of institutional litigation that have occurred.

> Those kinds of things happen as a result of a working relationship between the advocates, the plaintiffs, and the division, and then a discussion of that with the court, but without the monitor being the external person who all the time had his fingers into the program.

Once the court made clear that people were going to leave the institution, even the Attorney General's office joined forces in fighting back most, if not all, efforts by communities to resist it.

Minimal Organized Opposition

Unlike a number of other states, organized opposition in New Hampshire was minimal. To some extent, this stems from the fact that it is "unusual to advocate in New Hampshire" since it is not an "active consumer state."

There was an attempt by the Attorney General's office to create opposition parent groups like at "Willowbrook, Pennhurst and Connecticut's Southbury." The lawyers wanted to subdivide the class and say that the plaintiffs did not represent all of the Laconia residents. When they testified, however, it became apparent that these parents were in the same situation as the others. As one lawyer recounted:

> (When) I layed out what I thought community placements would be like, or an array of services...they very unequivocally stated to me if that's what you're talking about, of course,

> we would love our child to be there. That would be wonderful. We just don't think that could happen, but of course, we would like it.
>
> And they talked about the agony they all went through when they had to place their child. If those services were in place of course they wouldn't have done that. And they even revealed the horrors that their kids (went through)...one woman, one girl had been raped twice in the chapel I remember the mother breaking down...obviously those parents were in no different situations than ours.

There also was no union opposition. It's a local-state union, not part of larger organization such as AFSCME. As described by another professional:

> I remember in New York seeing a billboard near Troy that said, "When institutions close, everyone loses" put out by the union. Nothing like that ever happened here. There were also certain values in the union. They were friends. I knew them. They didn't want to be on the bad side. They didn't want to be perceived as supporting the state.

Key Events within Process

This section highlights a few of the events in the litigation to provide a sense of the dynamic processes involved as the case progressed.

Taking on the Case

In the Laconia situation, the litigation was initiated by parents, and the legal community only reluctantly became involved in what they knew would be a long term and costly commitment of resources. Two parents, both leaders in the ARC, "faced each other and realized that things are bad and something needs to be done."

According to the ARC director, their first attempt to meet

together with lawyers from a civil rights practice achieved a pledge of support, but ended due to another lawsuit that came up. They then tried to have New Hampshire Legal Assistance take the lead role. By all accounts, Legal Assistance was reluctant to become involved, especially after having just finished a two year period of prison litigation. Whether told by advocates or lawyers the story is very similar marked by an initial reluctance, a change in position based on parent advocacy, and then a full commitment to the case:

> Legal Assistance was not very happy about it...It was too big. They had just been involved at the prison...This is a monster. It'll take us three years or something like that to deal with this. Little did they know how many years it was going to take. But they did (it) because they had gotten direction that this was something they should do. And once they took it on, they went full speed ahead and really worked hard.

One of the key turning points in the decision was a meeting at Laconia where New Hampshire Legal Assistance sought input from the community as to what they should get involved in as they were making their plans for the future. The parents, including the ARC President, went to that meeting and talked "the community" into addressing this issue. New Hampshire Legal Assistance then committed two lawyers to the case, and always had one, two, or three involved.

Investigation Prior to Filing

New Hampshire Legal Assistance spent the good part of a year investigating conditions at the institution. As one of the plaintiff's lawyers explained:

> (We) found them at least as deplorable as the parents reported them. Maybe even more so because in many cases our visits were not sanitized by staff, and the administration, at least at the onset...(was) welcoming, because even they felt the conditions were frighteningly dangerous for the residents who lived there.

After the investigation was completed, several parents came forward to agree to have their youngsters be the named plaintiffs. Representative of the "custodial care" and warehousing of the time, one lawyer described these neglectful and abusive conditions:

> the physicians who were regularly performing small surgical procedures on people at Laconia, without anaesthesia, thinking that persons with disabilities did not neurologically have the same kind of pain as normal people did. Treatment plans that were either non-existent or not implemented or bordering on the absurd....The conditions at the clinic were absolutely frightening.

Discovery Process: Getting Serious

The process of filing the complaint, the depositions and interrogations, bringing in expert witnesses, and preparing volumes of documents, brought a seriousness of purpose to an area that had been increasingly neglected. In some ways, it was viewed as a necessary step to force state government to "take it seriously."

As described by Covert, MacIntosh and Shumway (1993), the families of Laconia residents had "time and again brought these and other injustices to the attention of state officials. Administrators at the institution and in the state's Developmental Services' office in Concord, while sympathetic, essentially were powerless to effect any change."

In effect, state officials and legislators largely took the position that "things were fine the way they were." As one state

official described the effect of the filing:

> And, so the lawsuit challenged their right to say that and to hold us as people in state government charged with the responsibility, the right to hold us back. So it really empowered us tremendously. And so that whole lawsuit process was fundamental in getting serious; it forced state government to take it seriously.

The discovery process itself was conducted in a very adversarial way which again contributed to the seriousness of the situation. It, thereby allowed the state program staff to "take risks" that they otherwise would not have been able to take.

> It was a very hard ball discovery process. The depositions and interrogations, expert witnesses by the busloads, truckloads of paper, and the things that were said, some of which were nasty, nasty, outrageous things, some of which were true and some of which were not, but certainly raised the seriousness that things were looked at. It was a milestone process and it shook out the lining and made it get really serious.

Within the institution, staff had been preparing for potential court action since around the time of the arrival of the new superintendent because "there had been rumblings as such with the families and the ARC." The superintendent himself had been reportedly "appalled when he came down from New Hampshire Mental Hospital and was quite vocal that people there were going to die." The staff needed to reconstruct what had happened in the preceeding seven years and submit the records to the attorney general and the plaintiffs for review. As one former staff member described the process:

> So people generally felt demoralized, and yet we were still mandated to follow through and dig for information. And where we could remember things where there was no documentation, we had to document that. And so we were actually putting together schedules from memory of how people spent their lives. I don't think anybody tried to fudge...They used the best recollection they had, but basically that's what it did fall back upon.

This was a very difficult time within the institution as people started to come in on an almost daily basis. While outsiders view this phase as opening up the institution and leading to improvements, as one staff member who is now a well respected manager of community services explained:

> Everybody was involved and wrapped up into the turmoil of attorneys and expert witnesses coming through on a daily basis at times just questioning and probing and accusing and blaming. And basically they were just asking to build a case, but people at the school took it very, very personally. They were very angry and upset. And I was among them...feeling like 'Hey, I'm doing the best I know how to do.' But, you know, we had to give them the information, and we had to do it as accurately as we possibly could, and we did. So, it was like 2 or 3 years of..that kind of thing.

Last Offer Before Trial

The "state" made a last offer very close to the trial. This "upped the ante" because if a court renders judgment against the plaintiff or if the decision is less favorable than the offer, than they have to pay all costs and fees from the time of the offer. This could amount to hundreds of thousands of dollars. The "offer of judgment" according to one attorney:

> would have without any equivocation on the part of the state, have provided for community placements for one half of the residents, but would have acknowledged the role for the institution for the so called severely and profoundly involved, the medically fragile, so called medically fragile, and as a resource to communities.

At this time in history, especially with the turning litigation tide, even reducing the size of the institution would have been considered a "major victory." One attorney described the ethical portion of the decision this way:

> The state's last offer before trial was to move all but 150 people out. (The TASH leader) said it would be a victory. Then he asked me, "Who is going to choose who will stay? I think it's a major victory, but do you want to make that decision?"

The plaintiffs' lawyers argued that the state's best efforts were not good enough. Given that implementation would rely on appropriations from the legislature in a very conservative state, the attorneys decided that "even if we don't get that much on paper, we might get more in actuality." The settlement, of course, did not offer any guarantees that the financing would be appropriated. So, the trial proceeded.

Court Order: Institutional Improvement, Community Services Development and Special Education Reform

The state, through the work of its planners, had submitted four plans to the court. Plan A was to tear down and build up the institution at enormous expense; plan B was a variation of institutional improvement; plan C was to reduce the institutional size to approximately 250 over four plus years, including with people with the most severe handicaps; and plan D was to accomplish the task in two years. Plan C was masterfully designed as the reasonable choice, was the "preferred choice of the state" and "also the best way to meet" what the judge had ordered. Plan C

became the accepted plan of implementation.

The judge did not order anybody placed in the community. He ruled that people had a "right to habilitation" but that it was up to the state of New Hampshire to decide where that habilitation would take place. As one of the plaintiffs' lawyers explained:

> But he said it was very clear to him from a factual matter that the preference should be for community placement even for the most involved. He made a lot of nice findings. And he further found that...in the community placement process, New Hampshire had creamed and discriminated against the most severely handicapped. He made good findings on spec(ial) ed(ucation), on the ability of even the most cognitively handicapped or impaired to learn and benefit especially in the right kind of setting...As a legal matter he felt that he couldn't order anyone out. So what was ordered was a plaintiff's implementation...He ordered all the area agencies established. He ordered some good improvements in special ed(ucation).

From the point of view of the state administration, the court order had three foci: institutional improvement, development of community service system, and reforms in special education. As one administrator who was responsible for preparing monthly reports to the court explained:

> One was to clean up the institution. Two was to develop community service options for people to the extent that we could do so with the resources we had available. And three was to make special ed really respond to the special ed needs of severely disabled youngsters. I see it as basically a three pronged order and the one, clean up the institution was basically done by 1985. We got the 225 placements; we had toilet paper in all the bathrooms, you know all those kinds of things.

When it came to the community, the court basically said "and the state shall continue to develop and maintain it, a

comprehensive array of system services for persons with disabilities in the community." The court order itself did not specify how many people, for whom community services should be developed, or how this was going to be accomplished.

The plan became important because the state of New Hampshire needed a road map as to how they were going to develop a community service system because it had none. The plan called for area agencies or community programs around the state which would have responsibility for case management, housing, day or work activities or incentives. These would be overseen and administered by a community board, separate and distinct from the state but contracting with the state. In essence, the court ordered that the infrastructure for the community system be funded and put in place.

Special Education: A Bonus

The special education piece was from the advocates' viewpoint "a bonus we hadn't planned on" and according to a state official "a very critical decision."

Prior to the change in institutional superintendents, only 30 or 40 youngsters under age 21 were still at Laconia. The division office decided that they were going to close the institutional licensed school. This could have been done by not asking for special education certification since "under special ed law, if you don't have a special ed program, you can't have special ed kids."

This was an extremely controversial decision, partially because the superintendent and institutional staff felt they were doing a "wonderful job" and that it was in fact an appropriate

program for children. The public school system concurred. To make things even more difficult, "the Laconia staff, who for the most part got nothing in terms of positive reinforcement, thought this is wonderful, now somebody recognizes what a great job we are doing."

As the state administrator who participated in the discussions with the institutional superintendent, 15 school superintendents and the director of special education conveyed:

> They all sat there to..(discuss) my decision to not ask for licensing of Laconia State School as a special ed school. And we managed to stick with it...It's not a place for little kids to be; we've got to get the kids out of here and we'll work with you to do that, but we are not going to ask for certification.

This was one of those situations where backing off because of the pressures would have made state officials "heroes." The school system was saying this is killing our budgets and others were saying there were no place for these kids. Yet, they managed to "make it stick" which proved to be critical in the long run, though on the short term this meant that the children often would be sent out-of-state by the school districts. Laconia did get "dead waivers" for two children who could "not benefit from education." As one state administrator reported on one of the "folks" today:

> So we got one of those dead waivers (as they were called) for two folks, one of whom received the ARC award for citizen of the year last year and is in a junior in high school in Laconia. We finally moved him into an apartment in Laconia.

Effect on State Administration and Planning

The director of Mental Health and Developmental Services

(MH/DS) in New Hampshire and the institutional superintendent at the time of institutional closure were both planners at the time of the lawsuit. Their experience and commitment during the initial process had a largely unknown impact on the final event. However, the description of the director's personal experience as a witness provides some insight into the experience as one of personal empowerment.

Although there was a lot of cooperation on one level, the entire trial and process surrounding it was "very threatening." As one lawyer explained, it is very difficult for anyone to rise above the fray because "things get more antagonistic than I think anyone would have expected." As the director recounted his experience:

> I was told at the time that I was the longest witness on the witness stand....And that process was very important. It does a lot of things for..to..you personally, but perhaps has got to be done and you've got to do it. It forces you to be very serious about what your positions are.

As a witness, people needed to take their own position, not what the plaintiffs or the state or the Governor wanted. This places a lot of strain on a person, especially for someone in a position where s/he will need to continue to work with people on both sides of the fence. As the director continued:

> And to leave that with one's credibility intact, and have it become something that you grow in, that personally empowers you to believe in yourself and believe in what you are saying and what you do, is a great thing, and it did that for me... It was also very empowering to me in my position.

State Positions

Another way to look at the legal actions is not in the

polarized form of plaintiffs versus defendants, but as "multiple parties" in the process with "multiple interests." In some ways, there is no such thing as "the state." As one state official explained:

> Well, who is the state? Is the state the parents who filed the lawsuit? They're citizens of the state. Or is the state the Attorney General's office who are attorney's representing but not necessarily being anymore of the state than I was or my next door neighbor was...I think there is a disagreement as to who was the state.

The role of the attorneys was to try to protect the legal position of the state. And yet, on the other hand, "the state" also wrote Action for Independence, plan C, and those are the documents that survived the process. In expressing the changing positions of the Office of Mental Retardation, one state official described it this way:

> Do we change our positions? I think we've changed our position, but not so much for or against one side, but rather that our conceptual ability of what community integration is and what it means, and how to achieve it, has changed. And our know how of how to do it has changed. Those are the things where I think we're different today than we were then.

Court Reports as Working Documents

The process of court reporting also turned out to be a useful management tool, even though it required a lot of paperwork. The "thick" monthly report prepared by the state Developmental Services was shared with the plaintiffs, the attorneys, and the DD Council who then had an opportunity to comment upon it. The process and relationship is what made it work:

> it was one of the better processes for managing the court order. That was because we had a good relationship (with)... the attorneys so we put stuff down in the report to the court. And they looked at it, and if there were questions, they would come back and ask us questions about it and we would change that in the next report or develop something else.

The reports also reflected work in progress instead of completed products. That was important to allow the flexibility to change and adapt and to have an ongoing momentum in a forward direction. As the person who prepared the reports shared:

> It was sort of an ongoing working document to move us forward toward accomplishing things that were in the order...It just allowed us to do the things that were required and still manage new initiatives and keep exploring other options.

Court Order as Leverage

The court order continued to be an active force even though there has been very little activity related to it. The attorneys have been able to go back to court to use it as leverage to keep the community services funded. As one attorney expressed:

> There have been episodes in the last three or four years where a new governor and/or commissioner of public welfare might not have fully appreciated the fact that there is in place a court order mandating these services. And when budget difficulties have threatened the viability and stability of these programs, we have been able to go back to court and impress upon those officials that there is still in place a court order and (the) Judge is still ready to enforce it.

The state has never been released from the court order. Every contract for community services includes in the first paragraph that these are developed pursuant to Garrity v. current Governor. The court is still there to supervise the implementation of different pieces of the order and how it effects individual

clients. As this state administrator said:

> It has been an ongoing, powerful reminder that we are headed in a direction, that we are still under supervision, that yes we are doing a great job, but there is always, it is kind of like selling used cars, there is always a higher authority if you want to make a deal.

Yet, from a management standpoint, one of the positive, workable aspects of the order was that it did not require the state to make extraordinary expenditures beyond which they could generate the income. There has been a good match between how the system developed with an intent to achieve "good programmatic outcomes" and "good cost-benefits" and the court order.

Related Factors in Closure

Several other important factors related to closure are briefly noted here, though, a few of these are explored in more depth in other case studies. These include: redefining admissions criteria, change in administration within the institution, the role of finances and planning, and the fact that no public statement was made regarding closure.

Approach to Institutional Admissions

Readmission criteria for Laconia were redefined to be very stringent so it was extremely difficult to be able to get into the institution. As one administrator explained:

> Redefining admission criteria, we made it where if you walked, talked, and chewed bubble gum, you couldn't get in. And if you're going to get in, you had better be on a respirator, with tube feeding and non toilet trained and a behavior problem simultaneously or otherwise the odds of admission were pretty low. So that was in the standards.

Admissions to Laconia also needed to go through the state office. As a disincentive to requesting an emergency admission, one step that was first taken is that one of their staff would come out to see if anything else could be done, such as staffing, and so forth. One of the keys, though, was the person who was in this role. As one of the state officials described:

> He is a nice guy, but he simply refuses to accept the fact that somebody needs to go to Laconia...Generally he has a way of working with people that is genuine and caring and they won't act up. Most of the people who ask for admission have behavioral problems....So we had a couple of these and then we never had anymore...He just, he just is so genuine in terms of his ease with people with disabilities that he never has a problem with anybody, but he always has a problem with administrators, always..

Through many different avenues, including the role of the public trial, an "attitude" was developed that people belonged in the community and would work together to make that happen. As this administrator continued:

> Gradually we develop this attitude that everybody had this attitude that nobody would go back to Laconia and nobody would ask for it, and nobody would accept it as an option. And everybody would struggle with how to put things together so that didn't have to happen. And it has been remarkably successful.

New Institutional Superintendent

By 1986, the attorneys were "stretching at straws for legal arguments" regarding further reductions or closure. Clearly, the situation could have gone either way, and an institutional superintendent could have stopped closure from occurring. About this time, a new institutional superintendent came

to Laconia who shared "much the same philosophy of the plaintiffs, the parents and the division." As the plaintiff's attorney recounted:

> When Bardley (the institutional superintendent) came on was key....The case could have gone either way...It would have been possible for a superintendent to stop closure. He infused staff with a philosophy of normalization where they shared it too even if it meant their job. There were some people who were less than helpful during the course of the suit who afterwards became as strong idealouges as those in the community.

The most remarkable changes took place in Laconia whereby the focus from within shifted towards "getting people into normal environments." In the 3 or 4 years prior to closure, there were many people in that institution "knowing that they were working themselves out of a job, but who did so believing that this was the correct thing to do." As a long time observer of the institution noted:

> and that was not the attitude of the staff at Laconia Staate School in 1976 and 1978 in 1980 or probably not even in 1985...There were those who acknowledged that people could leave, but no one to my recollection at the institution, save maybe one or two, felt that everyone could leave.

Finances and Individual Planning

Both financing through the use of the home and community-based Medicaid waiver, including a peculiarity in how the state system operated, and attention to individual planning also played key roles in the institutional closure.

The community system was "bankrolled" in part through the institution. The institution was funded with state dollars upfront, and Medicaid money would go to the state general fund in Concord.

When combined with community care funds, $1 million in instituional funds would buy $2 million in community services. As one person echoed the expressions of others: "If the community was in trouble, (people) would borrow against the bank. (The institution) could give money to the community and double it through the waiver."

The institutional costs also increased as the institution became smaller and smaller. Financially, it reached a point where it made sense to close. As one advocacy director shared, "We said to (one father), it is $120,000 to keep (your son) at Laconia per year, that's a lot of money. The state just cannot do it...The writing is on the wall, the institution is going to close; it has got to."

And yet, to the very last person, there was an effort by state officials to look at individuals and to try to respect the wishes and address the concerns of parents. As an advocate explained:

> So what we did was look at each person individually and that's how it worked. What was best for the individual. We designed their plan around them, and of course, every individual's plan indicated that they should be in the community so it was just a matter of time before that would happen.

No Public Statement of Closure

The original media coverage painting the attorneys and plaintiffs as radicals as advocates of closure may have been helpful in shaping the long term public stance of people within and outside of the system in their presentation and approach to closure. There never was a public statement of closure. As in the words of one person:

> We never said it was going to close publicly. (the division director) never said it publicly; (the institutional superintendent) never said it publicly. The ARC never really said it publicly...We never looked at a parent whose son or daughter were in there and said get ready because it is closing. Because that causes fear and people tend to resist.

Role of Litigation in Institutional Closure

Across diverse areas inside and outside of the state, people unanimously agree that the litigation and court order were absolutely essential conditions for the closure of Laconia within the state of New Hampshire. In their experience, without the litigation, at best it may have stayed open with a "residual population." One person who worked within the institution during the early litigation years believes the institution actually could have grown to twice its size if the litigation had not taken place.

People are also convinced that the community system would also not look at all the same, since the lawsuit was viewed as a "catalyst" for the development of that system ("the genesis... of the modern system."). Another possible course for New Hampshire, that did take place in a number of states, was shared by one of the attorneys:

> In a state like New Hampshire, given how conservative it is, without that kind of pressure and everything that went on, ...I think we may be looking at about the same picture now as we would (have)...10 or 15 years ago. In fact, I think that's the way it is in some states...if you don't either get major leadership or major lawsuit or a combination. I suppose some states today still look like 1963 or 74...I think New Hampshire could (have)...been one of those.

The litigation was critical partially because of the

conservative nature of the state, and the fact that the legislature and citizenry needed to know why changes must take place. As a long-time advocate shared:

> Why I still think the court case was essential is that what was needed to convince a very political conservative legislature and citizenry that things need to change. This is how bad it is and this is why it needs to change.

Because of New Hampshire's conservative nature and reluctance to become involved in "big services, big community systems," there was a need for people to "get ready" and to clarify the governmental role which would be consistent with the state's philosophy of live free or die, independent living, self determination or a strong community base.

The litigation also established judicial authority and "made it possible for people who were both inside the system and outside the system to really bring about change." The education of and obligations on the legislature were extremely important, and created a force that lasted over the decade of community services development. As one leader shared:

> It brought a measure of authority to the whole process so that in a constant process of competing interests of different issues, and I don't just mean one human service against another, but highways against human services, or low taxes against human services, or whatever, it established a clear compelling willingness in this area, that in part was public understanding, in part was judicial authority, and that has stayed with us through more than a decade and that has been extremely valuable.

In New Hampshire there were few negative impacts of the legal actions. Overall, "the sum has been so positive that any negative impact would have been very minor." As an "imperfect tool for social change," it does result somewhat in a two class system with

differential benefits, which is the nature of the intervention. However, to a large extent, these have been minimal.

Although the legal actions were considered essential, the course of the community and institutional changes is also attributable to the nature of the interaction between state leadership in implementation with the litigation, which was also an avenue for ongoing interaction with the plaintiffs "pushing them in progressive directions."

> Some people responsible for writing Action for Independence would have...put lots of time and energy into realizing...and developing that community services delivery system...(The court case) makes it easier for the people responsible for Action for Independence to realize the long range goals they have and the vision they have.

The effect was greater than most suits and as one lawyer recounted, "we were able to accomplish more than one can normally hope to accomplish in these sorts of things." Yet, another person added, the fact that this should happen in New Hampshire "of all places, says to me that it can happen anywhere."

For more information about the institutional closure, contact:

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For Community and Policy Studies, write:

2103 S. Geddes Street, P.O. Box 184, Syracuse, NY 13207

Documents Reviewed (Garrity v. Gallen)

1. Complaint, Civil Action 78-116
2. Motion of USA for Leave to File Complaint in Intervention (August 1978)
3. Composite Final Order (11/16/81)
4. Memorandum Opinion (8-17-81)
5. Defendants' Proposal for Negotiations in Settlement
6. Plaintiff's Submission, Draft Proposed Consent Decree
7. Alternatives for Approaching Garrity v. Gallen Court Order, Plan C (November 5, 1981)
8. Memorandum on Amendments (Addition to Garrity Court Order), December 22, 1983
9. Amendment to US Complaint in Intervention, July 26, 1979
10. Summary, Garrity v. Gallen
11. Correspondence NH Attorney General to Department of Justice, June 29, 1979; Cohen to NH Attorney General, July 27, 1979.
12. Defendants' Report Pursuant to Paragraph 2 of the Order of Implementation (November 1, 1982)
13. Correspondence, Cohen to Miller, July 27, 1978; NH Attorney General to Cohen, October 24, 1978.
14. Overview of Attorney General's Commitments Made to Justice Department.
15. Garrity v. Gallen Fact Sheet for Interested Citizens.
16. Proposed Agreement, Garrity v. Gallen
17. Mental Disability Law Reporter (Jan-Feb 1979)
18 Final Report to US District Court by State Board of Education (July 15, 1985)
19. State of New Hampshire Action for Independence